No. 92-1700

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GERTRUDE BAUMGART, et al.,

Petitioners,

—v.—

FAIRCHILD AIRCRAFT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether in a state wrongful death action removed to federal court solely as a bankruptcy related matter, the bankruptcy statutes require the district court to either retain jurisdiction or abstain and remand out of comity with the state court, but preclude *forum non conveniens* dismissal?

LIST OF PARTIES TO THE PROCEEDING

The following plaintiffs are parties to this proceeding: Gertrude Baumgart, Iuge Fiss, Marie-Luise Fricke, Regine Grigoleit, Erika Haferkorn, Peter Hellmer, Christiane Hennig, Magret Koeller, Janice Marie Morris, Brigitte Naber, Marie-Luise Remmers, Elsbeth Roske, Dorothie Schmidt, Roger Scholz, Fritz-Brown Scholz, Ursula Schubert, Gisela Sellmann, Karin Sotonyi, Helga Tennhard, and Kate Winter.

The defendant is Fairchild Aircraft Corporation.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (1a)[1] is reported at 981 F.2d 824 (5th Cir. 1993). It affirmed an unreported district court opinion. (22a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

1 References herein to "___a" are to pages in the appendix of this petition.

PROVISIONS OF LAW INVOLVED

28 U.S.C. § 157 Procedures

(b)(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 1334
Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1452
Removal of claims related to bankruptcy cases

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. . . .

STATEMENT OF THE CASE

In January 1990, the plaintiffs filed nineteen wrongful death actions in the Bexar County, Texas court against the defendant

arising from the 1988 crash of a Fairchild Metroliner aircraft in Germany. Plaintiffs alleged that the crash was caused by the plane's defectively manufactured electrical system. The suits were brought under a Texas statute, Tex. Civ. Prac. & Rem. Code § 71, which provided a state cause of action against a Texas company for the death of a foreign citizen occurring abroad. The defendant was headquartered in Texas and designed, manufactured and sold the subject aircraft there.

Three weeks after suit, defendant filed a bankruptcy proceeding in the federal court below, the Western District of Texas. One week later, the defendant answered the plaintiffs' claims in the Bexar County court, alleging a *forum non conveniens* defense.

In March 1990, the Texas Supreme Court squarely held in a case precisely on point that in actions brought under Tex. Civ. Prac. & Rem. Code § 71, *forum non conveniens* was inapplicable as a matter of law. *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990).

In April 1990, the defendant removed these actions to the Western District of Texas as related to its bankruptcy proceeding.

The plaintiffs promptly moved the federal court to abstain and remand the cases to Texas court. In their motion, all plaintiffs agreed to limit their claims to defendant's insurance coverage.

The district court, adopting a report and recommendation of the bankruptcy court judge, denied plaintiffs' motion and held that under 28 U.S.C. § 157(b)(5), "the wrongful death claims shall be tried in the district in which the bankruptcy case is pending."

With plaintiffs' consent, the bankruptcy court promptly confirmed defendant's reorganization plan and limited plaintiffs' recovery to the liability insurance coverage.

The defendant then moved the district court to decline bankruptcy jurisdiction and grant *forum non conveniens* dismissal. Plaintiffs opposed, claiming the district court had only two alternatives under the bankruptcy statutes: either exercise its bankruptcy jurisdiction under 28 U.S.C. § 157(b)(5) and try the cases, or abstain and remand the cases to state court under 28 U.S.C. §§ 1334(c)(1) and 1452(b).[2] Plaintiffs also renewed their motion to abstain and remand, arguing that following adoption of the reorganization plan, bankruptcy jurisdiction was no longer needed.

On September 30, 1991, a new district court judge was assigned to the case and granted the defendant's dismissal motion that day. (22a). The court agreed that there was no longer any need for bankruptcy jurisdiction over these cases. (23a-24a). But rather than abstain in deference to the state court, the court dismissed under the *forum non conveniens* doctrine. The decision did not address plaintiffs' motion to abstain and remand to Texas state court, or their arguments that dismissal was barred by the bankruptcy law, principles of federal-state comity and the *Alfaro* decision of the Texas Supreme Court.

The United States Court of Appeals for the Fifth Circuit affirmed on January 22, 1993 and held that 28 U.S.C. § 157(b)(5) did not preclude *forum non conveniens* dismissal. *Baumgart v. Fairchild Aircraft Corporation*, 981 F.2d 824 (5th Cir. 1993); (1a). The decision did not address plaintiffs' claim that abstention and remand to the Texas state court was the sole option to trial in the district court. *Id.* at 834-35; (16a).

Plaintiffs petition this Court for a writ of certiorari.

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2 Plaintiffs also claimed that Texas was not an inconvenient forum to the defendant, because it defectively designed, manufactured and sold the aircraft in Texas; post-crash testing was conducted by the defendant at its San Antonio headquarters; numerous witnesses and documents were located in Texas; the United States F.A.A. Ft. Worth office investigated the disaster and issued a key Airworthiness Directive to prevent a similar electrical failure; and the lead German government investigator agreed to appear at trial in Texas.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND THE FEDERAL-STATE CONFLICT CREATED WHEN THE DISTRICT COURT BELOW DECLINED JURISDICTION AND GRANTED A DISMISSAL BARRED IN STATE COURT UNDER A RULING OF THE HIGHEST TEXAS COURT RATHER THAN ABSTAIN AND REMAND UNDER THE COMITY PRINCIPLES EMBODIED IN THE BANKRUPTCY STATUTES.

Certiorari should be granted because the decision below is the first to conflict with the abstention and trial venue provisions of the bankruptcy law, and conflicts with the Second, Fourth and Sixth Circuits. Certiorari is also needed to settle a federal-state conflict created when the decision below allowed defendant to use its bankruptcy to remove state court actions and obtain *forum non conveniens* dismissal contrary to a Texas statute and ruling on point of the Texas Supreme Court. The decision below offends principles of federalism and comity with state courts incorporated in the bankruptcy law. The decision sanctions the unwarranted intrusion of federal courts into state court practice under the guise of bankruptcy jurisdiction.

Bankruptcy law establishes a unique jurisdictional scheme which reconciles the need for unitary federal authority over competing claims to a debtor's limited estate with comity for the state courts and state causes of action. The federal district court has exclusive jurisdiction over the debtor's bankruptcy petition. 28 U.S.C. 1334(a). The state and federal courts share concurrent jurisdiction in civil actions brought against the debtor, including wrongful death and personal injury cases, which are termed "bankruptcy related cases". 28 U.S.C. 1334(b); *see In re Brady, Texas Municipal Gas Corp.*, 936 F.2d 212, 218 (5th Cir. 1991) ("In . . . matters arising in or related

to title 11 cases, unless the Code provides otherwise, state courts have concurrent jurisdiction. . .").

When a debtor removes state court death and injury actions based on its bankruptcy proceeding, the Code provides that the district court where the bankruptcy is pending has two choices. The court may either: (1) retain federal jurisdiction, in which case 28 U.S.C. § 157(b)(5) mandates that the district court where the bankruptcy is pending "shall order" that the claims "shall be tried" either in its own district or in the federal court where the action arose; or (2) decline bankruptcy jurisdiction by statutory abstention under 28 U.S.C. § 1334(c)(1) "in the interest of justice, or in the interest of comity with State courts or respect for State law. . ." and remand the cases to the state court under 28 U.S.C. § 1452(b).

The decision below conflicts with the Second, Fourth and Sixth Circuits which ruled that, absent § 1334(c)(1) abstention in deference to the state court, § 157(b)(5) mandates trial of bankruptcy related actions in one of two specified federal district courts.

The Second Circuit held that "section 157(b)(5) has consistently been construed to recognize discretion in district courts to leave personal injury cases where they are pending. . . . and . . . 'where abstention does not occur'. . . the requirement for adjudication in a district court take[s] effect". *In re Pan American Corp.*, 950 F.2d 839, 844 (2d Cir. 1991), *quoting*, *In re White Motor Credit*, 761 F.2d 270, 273 (6th Cir. 1985).

The Fourth Circuit ruled that 157(b)(5) "was drafted to cover . . . a special group of cases, to wit, personal injury tort claims . . . and in that connection the section is supreme." *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1011 (4th Cir. 1986). *Piccinin* held that where abstention is not granted, § 157(b)(5) overrides 28 U.S.C. § 1412, the bankruptcy *forum non conveniens* statute, which permits transfer to other district courts. *Id.* at 1010-11.

The Sixth Circuit held:

> only "where abstention does not occur" will the requirement for adjudication in a district court take effect. . . . [T]he conferees contemplated that in liquidating tort cases in bankruptcy, *the district court would first decide whether it should leave the cases* with respect to which claims have been filed in the bankruptcy court *in the courts in which they are pending and then, if it decides against this course, the district court must try the cases itself or send them to the federal court for the district in which they arose.*

In re White Motor Credit, 761 F.2d 270, 273 (6th Cir. 1985) (emphasis added), *citing* 130 Cong. Rec. S8889 (June 29, 1984) (Sen. Dole).

Section 157(b)(5) was drafted to permit the district court to consolidate and resolve all state court tort claims against a debtor's estate in a single federal forum. *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir. 1987) (§ 157(b)(5) made "it possible to the extent constitutionally permissible to hear matters relating to a single bankruptcy in a single forum."); *A.H. Robins v. Piccinin*, *supra*, 788 F.2d at 1011, *quoting* 130 Cong. Rec. H7492 (June 24, 1984) (Rep. Kastenmeier) ("[t]he purpose of [157(b)(5)] . . . was, as Congressman Kastenmeier declared, to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case' ").

A single federal bankruptcy forum, however, was not needed for all tort cases and Congress desired to protect the states' interests in having state courts handle private disputes. Abstention was incorporated to allow state court cases which do not adversely impact the bankruptcy proceedings to continue without federal court interference. According to the 1977 House of Representatives report on the original bankruptcy abstention statute,[3] abstention was provided "to insure that the jurisdiction

3 § 1334(c)(1) "is substantially the same as former section 1471(d) of title 28 . . . . [and] the legislative history of former section 1471(d)

of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases. . . ." H.R. Rep. No. 595, 95th Cong., 1st Sess. 51 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6012.

In 1984, Congress redrafted the Code in response to this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). A provision requiring mandatory abstention of all state tort claims was considered because of concerns that bankruptcy jurisdiction over state tort actions was improvident or unconstitutional. Mandatory abstention, however, was rejected as "too broad, in that it prohibited the bankruptcy courts or district courts from considering any case that was based upon a State law claim." 130 Cong. Rec. S8890 (June 29, 1984) (Sen. Dole).[4] Senator Dole observed that § 157(b)(5) and 1334(c)(1) represented a "compromise" which gave the district court the choice of federal court trial or permissive abstention in deference to the state court:

> The Senate conferees reached a fair compromise on this issue. The result of the Conference discussion was a provision that preserves the integrity of bankruptcy jurisdiction while allowing abstention for personal injury cases where they can be timely adjudicated in State courts. In addition, where abstention does not occur, those cases will be handled by the district court where the bankruptcy has been filed or, if that court finds it appropriate, where the claim arose.

Ibid.

The Congressional history of the Code's abstention provision is replete with references to the importance of federalism and

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remains an important reference when construing its successor." *In re Pan American Corp.*, 950 F.2d 839, 845 (2d Cir. 1991).

4 28 U.S.C. § 157(b)(4) provides that "[n]on-core proceedings under section 157(b)(2)(B) [*i.e.*, personal injury and death claims] . . . shall not be subject to the mandatory abstention provisions of section 1334(c)(2)."

federal-state comity. That history also demonstrates that abstention was provided to allow district courts to defer to state courts to decide state claims when a unitary bankruptcy forum was not needed; to promote timely adjudication of state claims; and to avoid burdening the federal courts with state tort claims only tangentially related to a bankruptcy.[5]

Abstention and remand were appropriate herein because plaintiffs' claims were limited to Fairchild's insurance coverage and thus did not impact other creditors' claims to debtor's estate. *See Foust v. Munson Steamship Lines*, 299 U.S. 77, 79-80 (1936) (reversed lower courts' refusal to lift bankruptcy stay of death claim where "debtor is covered by liability insurance . . . the stay is unjust to the surviving father, gives no advantage to the debtor and benefits only the insurer."). There was no bankruptcy interest which required that federal jurisdiction over these state claims be maintained. If a bankruptcy interest required federal jurisdiction, a district court trial was mandated.

The decisions below violate the federal-state comity principles embodied in the bankruptcy law. Texas clearly asserted

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5 In discussing abstention, Senator Dole stated that "comity between Federal and State courts depends upon the mutual respect that each of those divisions of the national judiciary has for the jurisdiction of the other." 130 Cong. Rec. S7157 (June 19, 1984) (Sen. Dole), *quoted in, In re Pan American Corp.*, 950 F.2d 839, 846 (2d Cir. 1991). Senator Heflin spoke in favor of abstention, explaining that "I certainly am for continuing our great system of federalism in this country and not for the creation of an all powerful Federal bankruptcy system." 130 Cong. Rec. S7619 (June 19, 1984) (Sen. Heflin). Senator Hatch urged "respect for State court processes", observed that "federalism and respect for State court processes are important values even if there is some slight cost in terms of efficiency . . ." and that the "full exercise" of bankruptcy jurisdiction "may congest bankruptcy courts with state law issues tangentially related to a bankruptcy." 130 Cong. Rec. S6089, S7623 (May 21, 1984, June 19, 1984) (Sen. Hatch). Senator DeConcini observed that "timely State court adjudication . . . will not normally threaten the administration of the bankruptcy case." 130 Cong. Rec. S7620 (June 19, 1984) (Sen. DeConcini).

its state interest in giving foreign citizens a Texas forum to bring death and injury claims against Texas defendants. In *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), the Texas Supreme Court declared that the *forum non conveniens* doctrine was statutorily abolished in cases governed by Tex. Civ. Prac. Rem. Code § 71, which provided a cause of action for foreign citizens injured abroad by Texas defendants.[6] The Texas Supreme Court found that the rejection of *forum non conveniens* was a longstanding policy first adopted by the Texas legislature in 1913. *Alfaro*, *supra*, 786 S.W.2d at 677-78.

Fairchild used its bankruptcy filing to remove these cases to federal court three weeks after the *Alfaro* decision for the admitted purpose of seeking *forum non conveniens* dismissal not available in state court. Rather than curb the effect of bankruptcy jurisdiction on state actions, as Congress intended, the decisions below seriously undermine federalism and the integrity of the Texas state court system by approving the defendant's use of bankruptcy jurisdiction to circumvent a Texas statute and a Texas Supreme Court opinion.

In *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987), this Court applied non-statutory abstention in a federal civil rights action brought to enjoin application of Texas judgment execution procedures in a Texas state court case. *Pennzoil* observed that "[t]his Court repeatedly has recognized that the States have important interests in administering certain aspects of their judicial systems." *Id.* at 12-13. The Court granted abstention to uphold the Texas state court procedure based on

> the notion of 'comity,' that is a proper respect for state functions, a recognition of the fact that the entire country

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6 Section 71.031 of the Texas Civil Practice and Remedies Code provides in part:

> An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect or default causing the death or injury takes place in a foreign state or country.
>
> . . .

> is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . [T]he concept . . . represent[s] . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 10, *quoting Younger v. Harris*, 401 U.S. 37, 44 (1971).

Congress expressly intended to protect these same state interests in bankruptcy-related cases by adopting statutory abstention and remand. This Court has observed that "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43 (1971).

The decisions below failed to consider the substantial Texas state interests implicated herein. By dismissing the cases rather than abstaining after conceding that federal bankruptcy jurisdiction was no longer needed, "[b]oth the District Court and the Court of Appeals failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system." *Pennzoil Co. v. Texaco, supra*, 481 U.S. at 14.

The application of the *forum non conveniens* doctrine below was not only unprecedented but illogical, because federal jurisdiction was based on an action voluntarily filed by the defendant in the Western District of Texas. Equity bars a defendant who creates federal jurisdiction by filing a bankruptcy petition from asking the court to decline that jurisdiction to dismiss plaintiffs' removed state court actions. Indeed, to petitioners' knowledge, no court has ever granted *forum non conveniens*

dismissal to the party that filed the action which established federal jurisdiction.

Moreover, this Court has ruled that bankruptcy law should be applied "to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.' " *Butner v. United States*, 440 U.S. 48, 55 (1979).

This Court has also recognized that *forum non conveniens* "is not a principle of universal applicability." *United States v. National City Lines, Inc.*, 334 U.S. 573, 596-97 (1948). In *National City Lines*, the Court held that the purpose of federal antitrust statutes would be defeated "by application of the discretionary power comprehended by *forum non conveniens*." *Id.* at 586. Likewise, the purpose of exercising bankruptcy jurisdiction over state tort claims was defeated by the dismissal below.

The Fifth Circuit overlooked the unique nature of bankruptcy jurisdiction over state tort claims. Unlike other forms of general federal jurisdiction, bankruptcy jurisdiction is exercised for a limited purpose based on the status of the defendant-debtor. A unitary federal bankruptcy forum is available if needed. But once the district court handling the bankruptcy concludes that the claim will have no impact on the defendant as a debtor in bankruptcy, bankruptcy jurisdiction is unwarranted. In such cases, Congress has provided abstention and remand in deference to the state court. This unique Congressional scheme of broad federal bankruptcy jurisdiction tempered with abstention and remand in cases that will not significantly impact the bankruptcy ensures protection of debtors and creditors while preserving the important principles of federalism and comity. Those principles were violated here.

CONCLUSION

Certiorari should be granted to review the decision below.

Dated: April 22, 1993

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5784

Jan. 22, 1993

Gertrude BAUMGART, et al.,
Plaintiffs-Appellants,

—v.—

FAIRCHILD AIRCRAFT CORPORATION and
Swearingen Aviation Corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before:

REYNALDO G. GARZA, GARWOOD, *Circuit Judges*, and
WERLEIN*, *District Judge*.

WERLEIN, *District Judge*:

These consolidated cases arise from the crash near Kettwig, Germany of a Fairchild Metroliner III Aircraft owned and operated by Nurenburger Flugdienst ("NFD"), a German airline. Plaintiffs are nineteen German citizens who originally sought recompense for their injuries in the Texas state courts. Defendant Fairchild Aircraft Corporation ("Fairchild"), after filing a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Western District of Texas, removed

* District Judge of the Southern District of Texas, sitting by designation.

all nineteen cases to federal court. Fairchild then moved the court to dismiss the cases under the doctrine of *forum non conveniens*, arguing that Germany is the proper forum for the resolution of Plaintiffs' claims. Fairchild's motion was granted, and Plaintiffs appealed.

The major issue on appeal is whether the Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 157(b)(5), prohibits the district court from dismissing under the doctrine of *forum non conveniens* a bankruptcy-related wrongful death case that arose in a foreign country. We hold that the Act does not prohibit a *forum non conveniens* dismissal.

I. FACTS

On February 8, 1988, a Fairchild Metroliner III Aircraft, owned by the German airline NFD and operated as NFD Flight 108, was making a regularly scheduled flight from Hanover Airport in Hanover, Germany to Lohausen Airport in Dusseldorf, Germany. Approximately seven nautical miles away from landing, the aircraft was struck by lightning, lost electrical power, entered an uncontrolled descent, and flew in and out of the clouds for several minutes before finally crashing near Kettwig, Germany. The two pilots and all nineteen passengers perished.

Personal representatives of the deceased passengers, all of them citizens and residents of Germany, filed nineteen separate lawsuits against Fairchild[1] in sixteen different state district courts of Bexar County, Texas, alleging causes of action based on strict liability, breach of warranty, and negligence. Plaintiffs sought damages for wrongful death and survival, pre-judgment interest, and exemplary damages under Texas state law.

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1 Appellants also sued Swearingen Aviation Corporation ("Swearingen"), the predecessor in interest to Fairchild. Although Swearingen is named as a defendant in this action, the parties have advised the Court that Swearingen no longer exists as a corporate entity.

Fairchild, for reasons unrelated to the personal injury suits,[2] filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Western District of Texas. Fairchild subsequently removed all nineteen state court actions to the bankruptcy court, alleging that the actions related to its bankruptcy proceeding as contemplated by 28 U.S.C. § 1334(b).

Plaintiffs, in turn, moved for discretionary abstention under 28 U.S.C. § 1334(c)(1) or, alternatively, for remand of the nineteen cases to state court pursuant to 28 U.S.C. § 1452(b). The Honorable Emilio M. Garza, then United States District Judge, after conducting a *de novo* review of the Bankruptcy Judge's recommendation that Plaintiffs' motion be denied, adopted the recommendation in its entirety. The Court consolidated all nineteen actions in the district court and issued an Order lifting the automatic stay imposed by 11 U.S.C. § 362.

Fairchild then moved to dismiss the consolidated cases on the grounds of *forum non conveniens*, alleging that Plaintiffs' home country of Germany where the airline crash occurred is the proper forum for the resolution of Plaintiffs' claims. Plaintiffs replied that 28 U.S.C. § 157(b)(5) deprived the district court of any discretion to dismiss bankruptcy-related wrongful death action pursuant to the doctrine of *forum non conveniens*. The Honorable Edward C. Prado, United States District Judge, dismissed the consolidated cases and ordered Plaintiffs to file suit in Germany within 120 days.[3] It is from this ruling granting Fairchild's Motion to Dismiss that Plaintiffs now appeal.

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2 Fairchild cites "infighting among Fairchild's competing shareholder groups [leading] to severe lapses in management, followed by layoffs, and eventual pressure from the company's principal lender, Sanwa Business Credit," as the reason for Fairchild's Chapter 11 filing.

3 By Order dated September 30, 1991, Judge Prado granted Plaintiffs' request that the 120-day time limit for filing the actions in Germany be stayed pending the outcome of this appeal.

II. DISCUSSION

A court's authority to effect foreign transfers through the doctrine of *forum non conveniens* "derives from the court's inherent power, under Article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice, or oppression." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1155 (5th Cir.1987), *aff'd in part, vacated in part*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989), *vacated sub nom. Pan Am World Airways, Inc. v. Lopez*, 883 F.2d 17 (5th Cir.1989), *citing Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 530, 67 S.Ct. 828, 835, 91 L.Ed. 1067 (1947). Through this power a federal trial court may decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum. *Id., citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S.Ct. 252, 263, 70 L.Ed.2d 419 (1981); *Koster*, 330 U.S. at 530, 67 S.Ct. at 835; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S.Ct. 839, 842, 91 L.Ed. 1055 (1947).

The court's interest in controlling a crowded docket also provides a basis for the court's inherent power to dismiss on grounds of *forum non conveniens*: "the 'chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems' " *Id., citing Reyno*, 454 U.S. at 241, 102 S.Ct. at 258 (*quoting Koster*, 330 U.S. at 524, 67 S.Ct. at 831). "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Id., citing Gulf Oil Corp.*, 330 U.S. at 590-91, 67 S.Ct. at 921. Although the doctrine "arose in the areas of admiralty and equity," this Court has observed that the doctrine "is now applied in a wide spectrum of cases in both federal and state courts." *Id., citing Syndicate 420 at Lloyd's London v. Early American Ins. Co.*, 796 F.2d 821, 825 (5th Cir.1986)

(maritime insurance contracts case); *Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354, 359-60 (6th Cir.1985) (strict liability pharmaceuticals case).

After examining the cases spawned by the crash in Germany of NFD Flight 108, the district court determined that the convenience of the parties and the court and the interests of justice would be better served if the wrongful death actions were tried in Germany. While Appellants also take issue with the district court's findings as a substantive matter, Appellants' primary focus is their legal argument that the doctrine of *forum non conveniens* is not available to district courts in bankruptcy-related wrongful death actions. Appellants contend that the statutory language and legislative purpose of 28 U.S.C. § 157(b)(5) are inconsistent with and thus preclude a *forum non conveniens* dismissal. The question appears to be one of first impression.

A. *Effect of § 157(b)(5) on the Doctrine of Forum Non Conveniens*

Title 28 U.S.C. § 157(b)(5) provides that

> [t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy is pending.

28 U.S.C. § 157(b)(5) (West 1991). Appellants insist that the plain meaning and legislative history of the words, "[w]rongful death claims shall be tried in the district court . . . . ," render the doctrine of *forum non conveniens* inapplicable to bankruptcy-related wrongful death cases. Thus, argue Appellants, the district court is *required* to try these cases even if the convenience of the parties and the ends of justice would be better served by hearing the cases in a foreign forum in which the claims arose.

Although Appellants are correct in stating that the United States Supreme Court and this Court have held that the doctrine

of *forum non conveniens* is inapplicable when the language and legislative purpose of a statute are inconsistent with *forum non conveniens* dismissal, the cases cited by Appellants for application of this proposition are quite different from the case at bar. *United States v. National City Lines, Inc.*, 334 U.S. 573, 596, 68 S.Ct. 1169, 1181, 92 L.Ed. 1584 (1948) (*"National City Lines I"*), held that a district court could not employ the doctrine of *forum non conveniens* to accomplish a domestic transfer of venue in an antitrust suit.[4] The *National City Lines* cases, as well as the third case cited by Appellants, *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir.1982), *vacated on other grounds*, 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983) (a case also involving violations of the Sherman Act),[5] apply only in the limited context of antitrust actions. As explained in *Kempe*, there is a "crucial point" of difference between antitrust suits and other types of cases:

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4 *National City Lines I* was decided before Congress enacted 28 U.S.C. § 1404(a), which specifically authorized the district court, "[f]or the convenience of parties and witnesses, and in the interest if justice," to transfer civil actions "to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (West 1991). As noted by this Court in *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138 (5th Cir.), *cert. denied*, 493 U.S. 918, 110 S.Ct. 279, 107 L.Ed.2d 259 (1989):

> [i]n light of the new congressional mandate regarding transfers [§ 1404(a)], the Supreme Court allowed the [*National City Lines I*] case to be transferred to another court on later petition. *United States Nat'l City Lines, Inc.*, 337 U.S. 78 [69 S.Ct. 955, L.Ed. 1226] (1949) (*National City Lines II*). In that later case, the Court did not indicate what result it would reach in a case where application of the *forum non conveniens* doctrine would lead to dismissal of a Sherman Act case in favor of a foreign forum. Such a situation is not covered by section 1404, which preserves the action, albeit in a different federal venue.

Id. at 1144.

5 The statute at issue in both *National City Lines* and *Mitsui* is 15 U.S.C. § 22, which provides: "any suit . . . under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business."

> [A]ntitrust cases are unlike litigation involving contracts, *torts*, or other matters recognized in some form in every nation. A plaintiff who seeks relief by means of one of these types of actions may appropriately be sent to the courts of another nation where presumably he will be granted, at least approximately, what he is due. But the antitrust laws of the United States embody a specific congressional purpose to encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated. To relegate a plaintiff to the courts of a nation which does not recognize these antitrust principles would be to defeat this congressional direction by means of a wholly inappropriate procedural device.

Kempe, 876 F.2d at 1142-1143, *quoting Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811, 818 (D.D.C.1983) [emphasis added]. These same concerns were present in *Mitsui*, in which the court determined that Indonesia, the country to which transfer was sought, would refuse to entertain the plaintiffs' Sherman Act claims. *See Mitsui*, 671 F.2d at 891 ("A dismissal for *forum non conveniens*, then, would be the functional equivalent of a decision that defendants' acts are beyond the reach of the Sherman Act.")[6]

Unlike the facts in those cases, the district court here found "that German law recognizes products liability and wrongful death actions under Section 823 and 844 of the German civil code." In addition, the record supports the conclusion that all parties—plaintiffs, Fairchild, and also the potential third parties—are within the jurisdiction of the German courts. Based upon these findings, the district court concluded that "an adequate and available foreign forum exists" for the resolution of Appellants' claims in Germany. We agree that this case does not involve issues peculiar to American jurisprudence, and we conclude that the results reached in *National City Lines* and *Mitsui* are therefore not controlling precedents in this case.

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6 The court also noted that the antitrust statutes are penal in nature, and that principles of international law preclude one country's courts from executing the penal laws of another. *Mitsui*, 671 F.2d at 891.

National City Lines I does lay before us, however, the *approach* required to be taken in judging whether Congress, by its enactment of a statute vesting jurisdiction in the courts and prescribing venue, has thereby deprived the courts of discretionary power to defeat the plaintiff's choice of venue and has thus rendered the doctrine of *forum non conveniens* to be of no effect. The Court wrote:

> [The question] is one not to be answered by such indecisive inquiries as whether the venue or jurisdictional statute is labeled a "special" or a "general" one. Nor is it to be determined merely by the court's view that applicability of the doctrine would serve the ends of justice in the particular case. *It is rather to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection.*

334 U.S. at 597, 68 S.Ct. at 1182 (emphasis added). We therefore examine the legislative purpose of the Act, the language used, and whether the legislation is intended to vest power of choice in the plaintiff or, instead, confers power on the courts to qualify the plaintiff's choice of forum.

Title 28 U.S.C. § 157(b)(5) is part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("the Act"), which statute "[e]stablished a new system of jurisdiction, *necessitated* by the Supreme Court's ruling in *Northern Pipeline Constru. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). . . ." 130 Cong.Rec. H 6087-6088 (June 20, 1984) (floor statements) [emphasis added]. In *Marathon*, the United States Supreme Court had held that a previous grant to bankruptcy courts of sweeping jurisdiction was unconstitutional because it vested Article III power in judges who do not enjoy the protections and safeguards specified in that article. *Id.* at 62, 102 S.Ct. at 2867. Faced with the possibility that all matters previously delegated to bankruptcy courts would again be borne by the already over-

burdened Article III courts, Congress enacted § 157(b)(5) "to conform the bankruptcy statute to the dictates of *Marathon*" by excluding from bankruptcy court jurisdiction subject matter that is not specifically derived from the bankruptcy laws. *Matter of Wood*, 825 F.2d 90, 95 (5th Cir.1987).[7] This intent is manifested throughout the statute's legislative history. *See* 130 Cong.Rec. S 8891 (June 29, 1984) (remarks of Sen. Hatch), *reprinted in* 1984 U.S.C.C.A.N. at 590 ("Title I [which includes § 157(b)(5)] corrects the constitutional flaw discerned by the Supreme Court in the *Marathon* case which prohibited bankruptcy judges, who lack life tenure, from deciding certain bankruptcy cases grounded in State law."); 130 Cong.Rec. H 7489 (June 29, 1984) (remarks of Cong. Rodino), *reprinted in* 1984 U.S.C.C.A.N. at 576 ("Title I creates a new bankruptcy court arrangement to replace the provisions enacted in the Bankruptcy Reform Act of 1978—Public Law 95-598—which were found unconstitutional by the U.S. Supreme Court in [*Marathon*].") By placing in the district courts jurisdiction over certain types of cases, specifically personal injury and wrongful death actions, Congress responded directly to the constitutional infirmities identified by the Court in *Marathon* while preserving the Article I administrative court system that it had created to deal with bankruptcy-related matters.

Appellants argue that Congress's purpose was to consolidate all bankruptcy related matters and that Section 157(b)(5) was added as a special venue provision to advance the concept of a "single forum" for all bankruptcy-related matters. This "single forum" argument is undercut, however, by the explicit language of § 157(b)(5), which itself specifies a choice of forums in which a bankruptcy-related wrongful death action may be heard: in the district court for the district in which the bankruptcy is pending *or in the district in which the claim arose*. The passages quoted by Appellants in support of their

7 Section 157(b)(5) was drafted to limit the bankruptcy court's authority to so-called "core proceedings," a term coined in *Marathon* to refer to "the restructuring of debtor-creditor relations." *Marathon*, 458 U.S. at 71, 102 S.Ct. at 2871. Personal injury and wrongful death actions are "non-core" proceedings and thus cannot be heard by a bankruptcy court. *See* 130 Cong.Rec. H 7492 (June 29, 1984) (floor statements of Rep. Kastenmeier).

position actually militate against their "single forum" argument. The language provides that consolidation of actions in the forum where the bankruptcy is pending is *permissible*, but *not mandatory*. As stated by the First Circuit: "The new structure would make it *possible* to the extent constitutionally permissible to hear matters relating to a single forum." *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir.1987) [emphasis added].[8]

Congress's express conference of power on the district court in which the bankruptcy is pending to fix venue in the jurisdiction in which a plaintiff's cause of action arises, plainly indicated Congress's recognition (1) that the jurisdiction, as the site of the wrongful death, may have an actual interest in litigating the matter, and (2) that the most eyewitnesses to the incident and at least some evidence may be located there. In light of such a provision, we cannot fairly impute to Congress an intention implicitly to remove from the courts their inherent power also *to effect the transfer of an appropriate wrongful death claim to a foreign forum where the cause of action arose.*

The principal cases relied upon by Appellants involve application of § 157(b)(5) to domestic litigation, which § 157(b)(5) specifically addresses. Thus, for example, in *A.H. Robbins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.1986), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986), the district court in which was pending the Chapter 11 bankruptcy of the manufacturer of the Dalkon Shield, entered a tentative order that all actions against the debtor based upon personal injury tort or wrongful death claims arising from use of the Dalkon Shield would be tried in that district court. The principal issue was

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8 Appellants also argue that the bankruptcy court could maintain some supervision over the bankruptcy-related claims even while they are being litigated in another federal court, but not if the dismissal were to a foreign country. The argument is not persuasive. First, there is no sign that Congress intended for a district court in which the bankruptcy is filed to supervise the adjudication of a wrongful death action that it permits or directs to be tried in another district. And second, in this day of instant worldwide communications, the progress of a wrongful death case pending in Germany can be followed by the district court where the bankruptcy is pending virtually as easily as following the progress of a case in an adjacent judicial district.

whether transfer of the cases from other districts (5000 cases were pending) could be ordered by the receiving district court in which the bankruptcy was pending, or whether transfers, if made at all, would need to be ordered by the various district courts where the cases were pending, pursuant to the general bankruptcy venue statute allowing transfers in the interest of justice or for the convenience of the parties. *See* 28 U.S.C. § 1412. The Fourth Circuit had "no difficulty" in finding that the district court in which the bankruptcy was pending had authority under § 157(b)(5) to fix venue of personal injury tort actions against the debtor regardless of the district in which the controversy was pending. In reconciling § 1412 with § 157(b)(5) the Court wrote that as to a special group of cases, "to wit, personal injury tort claims against a debtor in Chapter 11 proceedings wherever pending," § 157(b)(5) is "supreme" in the sense of *denying* to the same district court the power to dismiss a case under the doctrine of *forum non conveniens* in order to effect an international transfer to a forum where the action arose. This argument is flawed, first, because § 157(b)(5) clearly confers *enlarged* powers upon the bankruptcy district court to fix venue, with no apparent intent to diminish venue powers already held by the court; and second, because the Fourth Circuit was engaged *only* in reconciling §§ 1412 and 157(b)(5), and found that between the two sections the latter was "supreme" in that limited context; the court never had before it a question of whether enactment of § 157(b)(5) served *sub silentio* to rescind the doctrine of *forum non conveniens*.

In *In re White Motor Credit*, 761 F.2d 270 (6th Cir.1985), also relied on by Appellants, the district court in which the bankruptcy was pending ordered that 160 separate, unliquidated and contingent products liability cases against the debtor, pending in various state and federal courts, would be left for adjudication in those courts. On appeal the debtor, similar to Appellants here, argued that § 157(b)(5) *curtailed* the district court's discretion over venue. The debtor argued that the new statute prevented the district court from abstaining as it had done and instead compelled the court to order trials either

before it or in the federal district courts where the claims arose. The Sixth Circuit wrote,

> [w]hen read in isolation, section 157(b)(5) seems to support the debtor's contention that the tort claims may not be liquidated in other courts, as the District Court has ordered; but a reading of the entire law in light of its purpose and history leads to the opposite conclusion.

761 F.2d at 271. The court went on to construe § 157(b)(5) in harmony with § 1334(c)(1), which allows discretionary abstention, and held that the district court had "authority to leave tort cases in the courts [including state courts] in which they are pending for liquidation there." 761 F.2d at 273. Thus, in *White Motor Credit* § 157(b)(5) once again was construed to *enlarge* the district court's power to fix venue over personal injury tort cases related to the bankruptcy pending in such court.

Other provisions of Title 28 demonstrate Congress's intent *not to require the district courts to entertain all bankruptcy-related cases over which they have jurisdiction*. 28 U.S.C. § 1334(b) provides that the district court's jurisdiction of such matters is "original but *not exclusive*." Moreover, 28 U.S.C. §1334(c)(1) provides: "[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or relating to a case under title 11." Courts interpreting § 1334(c) have held that the provision "summarizes and incorporates federal non-bankruptcy abstention doctrines." *In re Pan American Corp.*, 950 F.2d 839 (2d Cir.1991), *quoting General American Communications Corp. v. Landsell*, 130 B.R. 136, 146 (S.D.N.Y.1991). Again, it does not follow that Congress would expressly allow the federal district courts to defer by abstention to state courts "in the interest of justice," but would at the same time implicitly divest them of their inherent power to abstain when the interest of justice would be served by a case being heard in a foreign tribunal where the action arose.

An examination of Section 157 in its entirety is also instructive. The several subsections variously provide for referrals of

cases to the bankruptcy judges; allow bankruptcy judges to hear and determine all cases under Title 11 and all core proceedings arising under Title 11; list numerous examples of core proceedings; require the bankruptcy judge to determine if a proceeding is a core proceeding; exempt non-core proceedings from the mandatory abstention provisions of § 1334(c)(2); outline conditions under which a bankruptcy judge may hear a non-core proceeding related to a case under Title 11 and make recommendations to the District Judge; authorize the district court to withdraw any case or proceeding referred to the bankruptcy judge; and similar matters. Embedded in this procedural section is subsection (b)(5), at issue in this case. Read in the context of Section 157, where it appears, and in the context of the history giving rise to the Act and its remedial purpose, the language of § 157(b)(5) delineates jurisdiction *only as between the bankruptcy courts and the district courts*. In other words, non-core proceedings such as personal injury tort and wrongful death claims shall not be adjudicated in bankruptcy court, but in the Article III district court. Moreover, the district court in which the bankruptcy is pending shall have *added* power to order tried in its own venue personal injury tort and wrongful death claims filed elsewhere, or to order such cases tried in the districts where the claims arose. Once a personal injury tort or wrongful death claim is lodged in the district court where the bankruptcy is pending, however, neither the Act itself nor the legislative history of the Act evidences any intent on the part of Congress to abrogate the long-standing doctrine of *forum non conveniens* in the context of foreign transfers. Indeed, there is no reference to the doctrine of *forum non conveniens* anywhere in the statute's legislative history.[9]

This court was confronted with a similar issue in *In re Air Crash Disaster*. Plaintiff argued that certain language in the Warsaw Convention implicitly prevented a district court from considering and applying the doctrine of *forum non conveniens*. The argument was rejected:

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9 Likewise, a leading bankruptcy treatise's discussion of § 157(b)(5) does not even mention *forum non conveniens*, much less its "implied" repeal. *See* 1 *Collier on Bankruptcy* § 3.01 pp. 3, 82, 86 (15th Ed.1990).

> The party initiating the action enjoys the prerogative of choosing between [several] possible [national] forums but that selection is not inviolate. That choice is then subject to the procedural requirements and devices that are part of that forum's internal laws. . . . No evidence can be found anywhere that the drafters of the [Warsaw] Convention intended to alter the judicial system of any country. We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of *forum non conveniens*.
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> If we were to adopt the plaintiff's construction . . . , American courts could become the forums for litigation that has little or no relationship with this country. The plaintiff's interpretation . . . cuts against the Convention's underlying purpose of ensuring that a dispute arising out of an air travel accident is litigated in a forum that has an actual interest in the matter.

Id. at 1162 [citations omitted]. Similarly, the First Circuit held that a special venue provision in the United States securities laws does not prevent a district court from effecting foreign transfers under the doctrine of *forum non conveniens*:

> [W]e can find no good policy reason for reading the special venue provisions as if someone in Congress really intended them to remove the courts' legal power to invoke the doctrine of *forum non conveniens* in an otherwise appropriate case. The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal system work together, in harmony, rather than at cross purposes. To insist that American courts hear cases where the balance of convenience and the interest of justice require that they be brought elsewhere will simply encourage an international forum-shopping that would increase the likelihood that decisions made in one coun-

> try will cause (through lack of awareness or understanding) adverse effects in another, eroding uniformity or thwarting the aims of law and policy. And, to deprive American courts of their transfer power when, but only when, one of more than three hundred special venue statutes applies, would create a hodgepodge that would, or would not, bring about American adjudication of an essentially foreign controversy, depending upon the pure happenstance that Congress—at some perhaps distant period and likely out of a desire to widen plaintiffs' venue choices in typical domestic cases—enacted a "special venue" provision. *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3804 at 28 n. 2 (citing ALI study listing some 330 venue provisions in section of the United States Code not in Title 28). Such a result would seem thoroughly unsound.

Howe v. Goldcore Investments, Inc., 946 F.2d 944, 950 (1st Cir.1991). *See also Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir.1983) (upholding *forum non conveniens* dismissal of Jones Act claim even though Jones Act provides that jurisdiction "shall be" in the district court.)

From our review of the relevant materials, the legislative purpose, and the effect of the language used to achieve that purpose, we conclude that § 157(b)(5) was intended to confer new power upon the district court in which a bankruptcy is pending to qualify the choice of venue made by a plaintiff."[10] An enactment conferring upon the district court additional power to control venue cannot properly be construed to deprive the courts of their established discretionary powers over venue. Under such circumstances specific legislation would be necessary to abrogate the doctrine of *forum non conveniens*. There is no evidence here of a Congressional intent to do so by enactment of 28 U.S.C. § 157(b)(5), and we cannot construe the language more broadly than appears to have been intended by Congress to achieve the purpose of the Act. Especially in view of Congress's expressed intent that district courts in which the bankruptcy is pending may order nationwide transfers of cases

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10 *United States v. Natl. City Lines*, 334 U.S. at 597, 68 S.Ct. at 1182.

to permit, for example, wrongful death claims to be tried in any district where they may arise, we cannot read into the statute an implied repeal of the doctrine by which the courts have discretion to effect identical transfers to foreign tribunals where wrongful death actions arise. Accordingly, we hold that § 157(b)(5) does not abrogate the doctrine of *forum non conveniens* in the context of foreign transfers and that the district court was not precluded by such statute from dismissing the instant action on *forum non conveniens* grounds.

The second issue raised by Appellants, namely, whether abstention and remand are the district court's only available alternatives to retaining jurisdiction over a bankruptcy-related wrongful death case, is rendered moot by our holding above. We therefore now consider the third issue raised: whether the district court committed a clear abuse of discretion in ordering the *forum non conveniens* dismissal.

Review of the District Court's Forum Non Conveniens Dismissal

A district court's grant or denial of a motion to dismiss on the grounds of *forum non conveniens* may be reversed only where there has been a clear abuse of discretion. *Reyno*, 454 U.S. 235, 255, 102 S.Ct. 252, 266; *In re Air Crash Disaster*, 821 F.2d at 1147. Where the district court "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Reyno*, 454 U.S. at 257, 102 S.Ct. at 266 (upholding district court's dismissal of a products liability suit for reasons of convenience of trial, and requiring transfer of the case from Pennsylvania defendants and the likelihood that Scottish law was less favorable to Plaintiffs).

Appellants first contend that in granting the *forum non conveniens* dismissal the district court abused its discretion by "fail[ing] to consider that Fairchild was estopped from moving to dismiss." (Appellants' Brief at 22). Specifically, Appellants argue that Fairchild's removal of the case from state court in Bexar County to federal court in the Western District of Texas

precluded Fairchild from later moving to dismiss or transfer the case to any other forum. In support of this position, Appellants rely primarily on *Ins. Co. of North America v. Ozean Stinnes-Linien*, 367 F.2d 224, 226-227 (5th Cir.1966), wherein this Court held that a domestic transfer pursuant to 28 U.S.C. § 1404(a) precluded a subsequent motion to dismiss on the grounds of *forum non conveniens*. We find that *Ozean* is inapplicable to this case, as this case does not involve a § 1404(a) motion to transfer. Moreover, the United States Supreme Court has upheld, without any discussion of estoppel, a district court's dismissal under *forum non conveniens* even where the case had previously been removed to federal court and transferred to a different federal forum under § 1404(a). *See Reyno*, 454 U.S. at 235, 102 S.Ct at 252; *See also Nolan v. Boeing Co.* 762 F.Supp. 680 (E.D.La.1989) (*forum non conveniens* dismissal granted after removal to federal court).

Appellant next contends that the district court abused its discretion in its application of the *forum non conveniens* analysis. A *forum non conveniens* analysis involves a three step inquiry. First, the court must determine whether there exists another forum that is available to the litigants and would provide an adequate remedy to the prevailing party. *Reyno*, 454 U.S. at 234 n. 22, 102 S.Ct. 265 n. 22; *In re Air Crash Disaster*, 821 F.2d at 1164. "A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum." *In re Air Crash Disaster*, 821 F.2d at 1165; *Syndicate 420*, 796 F.2d at 830; *Calavo Growers of California v. Belgium*, 632 F.2d 963, 968 (2d Cir.1980). "A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court." *In re Air Crash Disaster*, 821 F.2d at 1165, *citing Reyno*, 454 U.S. at 253, 102 S.Ct. at 265; *Syndicate 420*, 796 F.2d at 829.

The district court determined that the courts of Germany could provide an adequate, available forum for the resolution of plaintiffs' actions. The court found: (1) that German law recognizes products liability and wrongful death actions under Section 823 and 844 of the German civil code, and (2) that all

parties in the case are within the jurisdiction of the German courts. Appellants have not challenged these findings, and we find no abuse of discretion in the trial court's holding.

The second step in the analysis requires a balancing of "private interest" factors. Such factors include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of willing, witnesses;[11] (3) probability of an opportunity to view the premises, if view would be appropriate to the action; and (4) other factors affecting the ease, speed, and expense of trial or the enforceability of a judgment obtained. *Gulf Oil*, 330 U.S. at 508, 67 S.Ct. at 843; *In re Air Crash Disaster*, 821 F.2d at 1162-1163. While reviewing the private interest factors, the court should also consider whether the defendant's motion to dismiss was filed in a timely manner. *In re Air Crash Disaster*, 821 F.2d at 1165.

In the case at bar, the district court found that several private interest factors favored dismissal, including (1) the existence in Germany of almost all of the physical evidence relating to the accident, including meteorological data, testimony of other pilots and eyewitnesses, cockpit voice recorder tapes and information from the flight data recorder, photographs of the wreckage, air traffic controllers' reports, and the results of tests performed by the German Accident Investigation Board ("GAIB") on the components and wreckage of NFD Flight 108; (2) the fact that NFD's headquarters are in Germany, and thus all evidence about the maintenance of the aircraft, the operational history of the aircraft, and records concerning the hiring and training practices of NFD are in Germany; (3) the fact that all evidence required to calculate damages, such as the decedents' health, life expectancies, educations, and present and future earning capacities, is in Germany, as are all of the wit-

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11 *See De Melo v. Lederle Laboratories Div. of American Cyanamid Corp.*, 801 F.2d 1058, 1063 (8th Cir.1986) ("It is of considerable importance . . . that litigation in the United States would deprive Lederle of compulsory process. . . .") *See also Schertenleib v. Traum*, 589 F.2d 1156, 1165 (2d Cir.1978) ("inability to bring [witnesses] here for live cross-examination before a fact-finder" is "[p]erhaps the most significant problem" making adjudication in a United States court inappropriate).

nesses with knowledge relating to those matters; (4) the fact that the witnesses in Germany are beyond the reach of the district court's compulsory process, thus requiring the parties, if jurisdiction over the case were retained, to face the cost of deposing foreign witnesses and the prospect of not having live witnesses at trial; (5) the inability of Fairchild to implead NFD and the co-pilot's estate as third-party defendants if the case were retained in the United States; and (6) language problems that would arise if the case were tried in the United States, including the need to translate into English all documents and investigation reports created in Germany. On the other hand, the district court found some factors in favor of retaining jurisdiction, including (1) respect for the plaintiffs' choice of forum;[12] and (2) potential difficulties regarding enforcement of any judgment that might be rendered by a German court.[13] (District Court Opinion at 8-12).

Appellants contend that the district court failed to give sufficient weight to the fact that certain of their evidence is located in Texas. Additionally, Appellants stress that GAIB Chief Inspector Schlegel agreed to testify in Texas and that the GAIB investigation report, which would contain much of the meteorological and air traffic data, would be admissable in the United States courts. We find, however, that the district court did give attention to such considerations. In fact, after outlining the many factors favoring transfer of this case to Germany the trial court wrote:

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12 Although there is generally a strong presumption in favor of a plaintiff's choice of forum, the United States Supreme Court has held that "a foreign plaintiff's selection of an American forum deserves less deference than an American citizen's selection of his home forum." *Reyno*, 454 U.S. at 256, 102 S.Ct. at 265-266.

13 In the instant case, the enforcement problem was mitigated substantially by the fact that the district court imposed conditions upon dismissal of the case, including (1) that Fairchild agree to satisfy any Judgment rendered by the German courts to the extent allowed by the bankruptcy plan; and (2) that Fairchild submit to the district court's retention of jurisdiction over the matter in the event that any judgments were not satisfied. (District Court Opinion at 15-16).

> To be fair, there is some evidence in the United States as well. Specifically, plaintiffs point to the fact that (1) there are nineteen present and former Fairchild employees in San Antonio who were responsible for the electrical system design, its testing and analysis, lightning testing and analysis, accident investigation, post-crash tests and post-crash remedial measures; (2) there are three Federal Aviation Administration ("FAA") personnel in Texas who certified the aircraft, investigated the crash, and issued the post-crash Airworthiness Directive; and (3) there are other experts on similar prior incidents and post-crash review of the lightning system of the aircraft who are located in Massachusetts, Ohio and Oregon. Additionally, some of the evidence that is in Germany could be made available in Texas.

(District Court Opinion at 9). In short, the trial court gave exhaustive and meticulous consideration to the private interest factors and concluded that, "on the whole, . . . the Court believes that the bulk of the evidence is in Germany and is more readily accessible there." No abuse of discretion has been demonstrated in the trial court's holding. Moreover, Fairchild's motion to dismiss, filed less than 130 days after the district court denied Plaintiffs' motion to abstain or remand, was filed in a timely manner.

Because we find that the district court did not err in holding that an appropriate alternate forum exists for Appellants' claims and that the private interest factors weigh in favor of a *forum non conveniens* dismissal, we need not reach the third step of the analysis, which involves a consideration of certain "public interest" factors.[14] *Empresa Lineas Maritimas v.*

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14 Such "public interest" factors include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies resolved at home; (3) the interest in having the trial of a diversity case in the forum that is familiar with the law that must govern the action; (4) the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. *In re Air Crash Disaster*, 821 F.2d at 1162-1163, *citing Gulf Oil*, 330 U.S. at 508, 67 S.Ct. at 843.

Schichau-Unterweser, 955 F.2d 368, 376 (5th Cir.1992), *citing In re Air Crash Disaster*, 821 F.2d at 1165 (mandating consideration of public interest factors only if private interests do not favor dismissal). Nonetheless we find that the district court considered the public interest factors,[15] that it committed no abuse of discretion in reaching its conclusions, and that Appellants' complaints are without merit.[16]

In light of the foregoing, we find no clear abuse of the district court's discretion. The airline crash itself and other principal events surrounding the accident took place in Germany, the vast majority of the expected evidence and anticipated witnesses are located in Germany, and Germany is the residence of all plaintiffs and of three potential third-party defendants. While appellants correctly assert that both Germany and the State of Texas have contacts with the subject matter, we agree with the district court's determination that, "on balance, . . . Germany is the focal point of this case."

AFFIRMED.

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15 The district court considered the following public interest factors: (1) the heavy caseload of the Western District of Texas; (2) the strong interest Germany has in ensuring that its citizens are compensated for harms done to them; (3) the interest of Texas in deterring defective products; and (4) the likelihood that German law would govern the case. The court then concluded that these factors favored dismissal.

16 Specifically, Appellants argue that the district court (1) failed to consider the interests of the Western District of Texas as the locus of Fairchild's bankruptcy; (2) failed to recognize the "significant interest" on the part of Texas with respect to the liability of Texas manufacturers for products manufactured in Texas; and (3) gave undue weight to the *Reyno* and *Nolan* cases. *See Nolan v. Boeing Co.* 919 F.2d 1058 (5th Cir.1990). Appellants additionally contest the district court's determination that the law of Germany, and not that of Texas, applies to this case.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-90-CA-818
DOCKET III

FILED SEPTEMBER 30, 1991

GERTRUDE BAUMGART, ET AL.,

Plaintiffs,

—VS.—

FAIRCHILD AIRCRAFT CORP. and
SWEARINGEN AVIATION CORP.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS ON GROUND OF *FORUM NON CONVENIENS*

Upon review, the Court finds that defendant Fairchild Aircraft Corporation's Motion to Dismiss on Ground of *Forum Non Conveniens* should be GRANTED.

I. *Background*

A. *Facts*

These consolidated wrongful death actions arise out of the crash of an aircraft built by defendant Fairchild Aircraft Corporation ("Fairchild"), and owned and operated by a German airline, Nurnberger Flugdienst ("NFD"). The crash occurred on February 8, 1988, near Kettwig, Germany as NFD Flight 108 was making its approach to Lohausen Airport in Dusseldorf. About seven miles short of the runway, Flight 108 was struck by lightning. The aircraft lost electrical power and

entered an uncontrolled descent for about two minutes before it came apart in the air and crashed. The two crew members and all nineteen passengers were killed when the aircraft went down.

On June 26, 1989, after finishing its investigation into the cause of the accident, the German Accident Investigation Bureau ("GAIB") issued a report in which the investigators concluded that the accident was caused by the airplane losing its entire electrical supply after the lightning strike. The report also stated that the crew flew into an area where lightning strikes could be expected although they could have flown around it, that they did not agree on a flight route in the vicinity of the thunderstorm, and that they were unprepared for the strike. Thus, both product design and crew error were listed as possible causes of the accident.

B. *Procedural History*

These wrongful death actions were originally filed in sixteen district courts in Bexar County, Texas. The claimants, all German nationals and residents, are the surviving relatives of the passengers killed in the accident. After filing for Chapter 11 protection on February 1, 1990, Fairchild timely removed the nineteen cases to the Bankruptcy Court for the Western District of Texas, relying on 28 U.S.C. § 1334(b) and 28 U.S.C. § 1452(a). On June 18, 1990, the Bankruptcy Court denied plaintiffs' Motion to Remand or Abstain. On July 30, 1990, the District Court entered an Order Adopting the Bankruptcy Court's Recommendation and Order Withdrawing Reference to Bankruptcy Court. These cases were consolidated by an Order entered on September 21, 1990.

After the Bankruptcy Court lifted the automatic stay imposed by 11 U.S.C. § 362, defendant filed this Motion to Dismiss on Ground of *Forum Non Conveniens*. When this Motion was filed, the pendency of the bankruptcy proceeding in the Bankruptcy Court complicated disposition of this matter. Since that date, however, a bankruptcy plan has been entered which limits plaintiffs' possible recovery to available insurance coverage. In light of the adoption of this plan, plaintiffs have

conceded that there no longer is any need for this Court to retain jurisdiction because of the pendency of the bankruptcy proceeding.

Accordingly, the Court will address the merits of defendant's *forum non conveniens* argument.

II. *Discussion*

The doctrine of *forum non conveniens*

> "[R]ests upon a court's inherent power to control the parties and cases before it." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1153 (5th Cir. 1987). It empowers a federal trial court to decline jurisdiction if it appears that the convenience of the parties and the court, and the interests of justice, instruct that the action be tried in another forum. *Air Crash*, 821 F.2d at 1154; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S.Ct. 252, 263, 70 L.Ed.2d 419 (1981). Th defendants bear the burden of persuasion on all elements of the *forum non conveniens* analysis. *Air Crash*, 821 F.2d at 1164.

Nolan v. Boeing Co., 762 F. Supp. 680, 682 (E.D. La. 1989), *aff'd*, 919 F.2d 1058 (5th Cir. 1990).

A. *Availability and Adequacy of Foreign Forum*

Prior to evaluating the question of whether a foreign forum would be more appropriate, the Court "must first determine that an available and adequate [alternative] forum exists." *Nolan*, 762 F. Supp. at 682.

> A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court.

Air Crash Disaster, 821 F.2d at 1165.

1. *Availability of the Foreign Forum*

Defendant argues that the German courts are available as an alternate foreign forum. The Court notes that all of the plaintiffs and both crew members were German residents and nationals, and that NFD is a German corporation with its headquarters in Germany. As a result, all of the plaintiffs and the potential third-party defendants have ready access to and are within the jurisdiction of the German courts.

Further, a "defendant's submission to the jurisdiction of an alternate forum renders that forum available for purposes of *forum conveniens* analysis." *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983) (citing *Vaz Borralho v. Keydrill Co.*, 696 F.2d 379, 393 (5th Cir. 1983)). In the case at bar, while defendant is an American corporation, it has agreed to ensure that the German courts are an available forum by waiving any procedural or substantive hurdles that might otherwise prevent plaintiffs from pursuing their claims in the German courts.

Thus, the German courts are an available forum.

2. *Adequacy of the Foreign Forum*

Plaintiffs have submitted no argument that they would be treated unfairly in the German courts, or that they would receive lesser benefits there than if they were allowed to proceed in this Court. Further, there has been no suggestion that plaintiffs will be deprived of any, much less all, remedies if this case were to proceed in the German courts. In fact, defendant asserts, and plaintiffs do not contest, that German law recognizes products liability and wrongful death actions under Sections 823 and 844 of the German Civil Code. *See Rubenstein v. Piper Aircraft Corp.*, 587 F. Supp. 460, 461 (S.D. Fla. 1984).

Accordingly, an adequate and available foreign forum exists.

B. *Merits of the Forum Non Conveniens Motion*

Having found that an alternative forum exists, the Court next turns to the heart of the *forum non conveniens* motion. When

evaluating defendant's motion, the Court must always bear in mind that "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Air Crash Disaster*, F.2d at 1162 (quoting *Koster v. American Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 527, 67 S.Ct. 828, 833, 91 L.Ed. 1067 (1947)).

To guide trial court discretion, the Supreme Court has put forth a testing balancing "private interest factors" affecting the convenience of the litigants, and "public interest factors" affecting the convenience of the forum. *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1141 (5th Cir. 1989).

> The private interests to be considered are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of willing, witnesses; probability of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Air Crash Disaster, 821 F.2d at 1162-63 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed.2d 1055 (1947)).

"[T]he Court must also weigh in the balance the plaintiffs' choice of forum. Generally, courts should not disturb the plaintiff's choice of forum unless the balance strongly favors the defendants." *Nolan*, 762 F. Supp. at 682. "[A] foreign plaintiff's selection of an American forum [however] deserves less deference than an American citizen's selection of his home forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56, 102 S.Ct. 252, 265-66, 70 L.Ed.2d 419 (1981). This is so because deference is afforded only when "the plaintiff has chosen the home forum. When the home forum has been chosen it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable." *Id.*

> The public interest factors include the administrative difficulties flowing from court congestion; the local interest

> in having localized controversies resolved at home; the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Air Crash Disaster, 821 F.2d at 1162-63 (citing *Gulf Oil*, 330 U.S. at 508-09, 67 S.Ct. at 843).

In the case at bar, the Court must balance the private and public factors in order to determine whether the convenience of the parties and the ends of justice will be served by making the parties resort to the German courts.

1. *Private Interest Factors*

A review of the evidence and recent case law shows that the private interest factors weigh in favor of dismissing the case.

a. *The Nolan and Piper Aircraft Cases*

In *Nolan*, the case arose from a crash in the United Kingdom of an aircraft owned and operated by a U.K. corporation, British Midland Airways. Although the aircraft was designed, tested and manufactured in the United States, the *Nolan* district court found that virtually all of the relevant evidence was in the U.K.

> Statements of witnesses, photographs of the wreckage and crash site, air traffic control and cockpit voice recorder tapes, and information from the flight data recorder are all in the U.K. The report of the [accident investigation board] . . . and individuals who performed the investigation of the crash are there. All of the evidence regarding the operation and maintenance of the plane . . . is there. Records and witnesses regarding operational and maintenance history as well as pilot and technician training are [in the U.K.]

Nolan, 762 F. Supp. at 683.

In affirming the decision of the district court to dismiss the case, the Fifth Circuit noted that

> [T]he evidence regarding the crash itself and the actions of British Midland Airways—which is essential to the defendants' claim that pilot error caused the crash—is in the United Kingdom. The [district] court also noted that (1) [because the United Kingdom was the home of most of the represented plaintiffs] substantially all of the damages evidence is in the U.K.; (2) many of the witnesses, most of whom were in the U.K., were beyond the compulsory process of the federal courts; and (3) the defendants would be unable to join BMA as a third-party defendant in the federal forum.

Nolan, 919 F.2d at 1068-69.

The case addressed by the *Nolan* court are strikingly similar to those in the case at bar; thus, the Court would be within the bounds of its discretion were it to follow the lead of the *Nolan* court and dismiss this case.

The same is also true of the *Piper Aircraft* case, as the *Nolan* district court recognized.

> *Piper Aircraft* arose out of an air crash in Scotland. The plaintiff in that case sued the manufacturers of the airplane and propellers. Even though records of the design, manufacture, and testing of the plane and its propellers were located in the United States, the Supreme Court held that it was not unreasonable for the district court to conclude that the trial should be held in Scotland.

Nolan, 762 F. Supp. at 683.

With these two decisions in mind, the Court turns to the facts in the case at bar.

b. *The Case at Bar*

(1) Sources of Proof, Witnesses, and Ties to the Alternative Fora

The case at bar involves the crash in Germany of an aircraft owned, maintained and operated by a German company. All of the decedents and their relatives and heirs are German. On the other hand, the aircraft was designed, built and tested in Texas by a Texas corporation.

While there may be a substantial connection to Texas, most, if not all, of the evidence relating to the crash is in Germany. For instance, all of the physical evidence of the wreckage; the meteorological data; the testimony of the pilots of aircraft landing before and after the NFD flight, as well as other eyewitnesses; the photographs of the wreckage; the cockpit voice recorder tapes and information from the flight data recorder; the recorded radar and flight path data; the air traffic controllers' reports, and tapes and transcripts of their communications with the crew; and the results of tests performed by the GAIB on components and wreckage are in Germany.

Additionally, because NFD's headquarters is in Germany, all evidence about the maintenance of the aircraft, the operational history of the aircraft, and records concerning the hiring and training practices of NFD are in Germany. Moreover, all damages evidence, such as the decedents' health, life expectancies, educations, present and future earning capacities, and all of the witnesses with knowledge relating to these matters are in Germany.

To be fair, these [sic] is some evidence in the United States as well. Specifically, plaintiffs point to the fact that (1) there are nineteen present and former Fairchild employees in San Antonio who were responsible for the electrical system design, its testing and analysis, lightning testing and analysis, accident investigation, post-crash tests and post-crash remedial measures; (2) there are three Federal Aviation Administration ("FAA") personnel in Texas who certified the aircraft, investigated the crash, and issued the post-crash Airworthiness Directive; and (3) there are other experts on similar prior inci-

dents and post-crash review of the lightning system of the aircraft who are located in Massachusetts, Ohio and Oregon. Additionally, some of the evidence that is in Germany could be made available in Texas.

On the whole, however, the Court believes that the bulk of the evidence is in Germany and is more readily accessible there. Further, the evidence that is in the United States can be produced in Germany more readily than the evidence in Germany can be produced here. Moreover, while defendant disputes the value of many of the witnesses listed by plaintiffs, it has agreed to make all relevant witnesses and any documentation within its control available in Germany.

Last, but not least, the witnesses that are in Germany are beyond the reach of this Court's compulsory process. If the Court exercises its jurisdiction and retains the case, the parties will face the cost of deposing foreign witnesses, the possibility that adequate examination might not be available, and the prospect of not having live witnesses at trial.

In summary, the Court believes that as far as the connections to the alternative jurisdictions, and the relative ease of access to sources of proof and to relevant witnesses are concerned, Germany would be a more appropriate forum.

(2) *Inability of Defendants to Implead Third Party Defendants*

In addition to the factors discussed above, another consideration is the fact that this Court does not have jurisdiction over all of the relevant parties; specifically, NFD and the estate of the airplane's co-pilot.

Defendant contends that in light of the GAIB's report, crew error was a major contributing factor to the accident. If defendant can establish that the accident was caused by negligence of the crew or NFD, then there is the possibility that defendant will be relieved of some or all liability. While the Court has jurisdiction over the estate of the pilot due to the estate's filing a cause of action that is now in this Court, the Court does not and cannot acquire jurisdiction over NFD or the co-pilot's estate. Thus, defendant cannot implead either of these parties

in this action and, if plaintiffs gain a judgment, defendant would be forced to go to Germany to attempt to obtain contribution from them. The problems posed by defendant's inability to implead potential third-party defendant support dismissal of this case. *See Nolan*, 762 F. Supp. at 684 (citing *Piper Aircraft*, 454 U.S. at 259, 102 S.Ct. at 267-68).

(3) *Language Problem*

The fact that much of the evidence is in the German language would present a problem if this case were to be tried in this Court. On the other hand, if the case is prosecuted in Germany, evidence in the English language will present a problem. To help push the Court in its favor, defendant has offered to produce evidence within its control in German at its own expense. While this will alleviate the problem to a certain extent, on balance, this factor does not point strongly in one direction or the other.

(4) *Plaintiffs' Choice of Forum*

While the plaintiffs' choice of forum usually is to be given substantial deference, that is not so in this case. Here, the plaintiffs are all German nationals and residents. Thus, rather than selecting their home forum, they have selected a forum the convenience of which, from their perspective, is questionable. As a result, the Court finds that although it will respect and give weight to the plaintiffs' choice of forum, this choice does not demand the respect it might receive under other circumstances.

(5) *Enforceability of Judgment*

Finally, the Court must be aware of potential difficulties the plaintiffs might have in enforcing any judgment they might obtain. "This Court can protect plaintiffs by conditioning dismissal on defendant's agreement to satisfy any final judgment rendered by a court in" Germany. *Nolan*, 762 F. Supp. at 684. In fact, defendant has proposed such a conditional dismissal

and the Court believes that such a condition will satisfactorily address this potential problem.

On the whole, the private interest factors, particularly the ease of accessibility to sources of proof and relevant witnesses, and the inability of defendant to implead third-party defendants, weigh in favor of the Court dismissing the case.

2. *Public Interest Factors*

The Court next turns to the public interest factors and, upon review, determines that like the private interest factors, these considerations weigh in favor of dismissing the case.

Without rehashing the facts faced by the court in *Nolan*, the district court in that case found that the public interest factors weighed in favor of the U.K. forum. Specifically, the district court found that

> None of the more than 100 plaintiffs in these sixteen cases is a U.S. resident or citizen. The accident occurred in England and English law would most likely govern the resolution of these cases. Moreover, the district court noted that a trial could last for months and found that because the controversy had no connection whatsoever with the state of Louisiana, such onerous jury duty should not be imposed on the citizens of Louisiana.

Nolan, 919 F.2d at 1069.

In the case at bar, the accident occurred in German airspace, all of the decedents and plaintiffs are German, and the potential third-party defendants are German. While there are several distinctions between *Nolan* and the case at bar, the Court finds that, as they did in *Nolan*, the public interest factors argue in favor of dismissing this case.

First, while this case involves only nineteen plaintiffs and, therefore, would not take as long to try as the *Nolan* case with its 100 plaintiffs, this case still will involve a substantial amount of the Court's time. The statistics shows that the judges in the Western District of Texas carry one of the heaviest caseloads per judge of all U.S. federal judges. Administrative Office of the United States Courts, *Annual Report of the*

Director, Fed. Judicial Workload Statistics, App. I, Tbl. X-1 (1989). While similar statistics are not readily available for German courts, the situation there could not be worse.

Second, the Court recognizes that Texas has an interest in this controversy because the aircraft was designed, manufactured, and tested in Texas by a Texas corporation. On the other hand, the Supreme Court has noted that while "American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products . . . the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant." *Piper Aircraft*, 454 U.S. at 260, 102 S.Ct. at 268. In contrast, German citizens have strong interest in ensuring that its citizens are compensated for harms done to them. If, as alleged, either the pilot, co-pilot, or NFD contributed to causing this accident, the German interest in this case is that much stronger.

Finally, it is likely that German law will govern this case. In determining the law to apply, Texas has adopted the "most significant relationship test" set out in the Restatement (Second) of Conflicts of Laws § 145. *Total Oilfield Serv., Inc. v. Garcia*, 711 S.W.2d 238, 239 (Tex. 1986). Section 145 provides that the

> [C]ontacts to be taken into account . . . to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, resident, nationality, place of incorporation and places of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.

Price v. Litton Sys., Inc., 784 F.2d 600, 604 (5th Cir. 1986).

In the case at bar, Germany is the place of the injury and is the residence of all of the plaintiffs and the three potential third-party defendants. Further, Germany is site where any acts by the third-party defendants that contributed to the crash occurred. Texas, on the other hand, is the state in which the aircraft was designed, tested and manufactured. Although both jurisdictions have contacts with this case, on balance, the Court

finds that Germany is the focal point of this case and, therefore, that the German law will most likely apply.

In summary, the Court believes that like the private interest factors addressed above, the public interest factors also weigh in favor of dismissing this case.

III. *Conclusion*

Accordingly, for the foregoing reasons, the Court finds that defendant's Motion to Dismiss on Ground of *Forum Non Conveniens* should be GRANTED with the following conditions:

(1) Defendant shall submit to service of process and jurisdiction in the appropriate German forum;

(2) Plaintiffs shall file suit within 120 days of the date of the order of dismissal;

(3) Defendant shall formally waive in the German proceedings any statute of limitations defense that has matured since the commencement of these actions in Texas state court;

(4) If the German statute of limitations on the causes brought before this Court is shorter than that of the state of Texas such that the action would be barred by German law but not by Texas law, defendant shall formally waive any such defense in the German proceedings;

(5) Defendant shall make available in Germany all relevant witnesses and documents as ordered by the German courts;

(6) Defendant shall formerly agree to satisfy any final judgments rendered by the German courts to the extent allowed by the bankruptcy reorganization plan;

(7) Defendant agrees to allow this Court to resume jurisdiction over this matter if any judgments obtained against it by plaintiffs are not properly satisfied.

IT IS SO ORDERED.
SIGNED this 30th day of September, 1991.

EDWARD C. PRADO
Edward C. Prado
United States District Judge